



COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

DEVAL L. PATRICK
Governor

TIMOTHY P. MURRAY
Lieutenant Governor

IAN A. BOWLES
Secretary

LAURIE BURT
Commissioner

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

June 26, 2008

In the Matter of Margot Xarras

Docket No. 2008-059
DEP File No. UAO-CE-07-9007-46C
Leominster

RECOMMENDED FINAL DECISION

On February 29, 2008, Margot Xarras (the "Petitioner") filed with the Office of Appeals and Dispute Resolution ("OADR") a request for an adjudicatory hearing with regard to a Unilateral Administrative Order ("UAO") issued by the Central Regional Office of the Department of Environmental Protection (the "Department") with respect to alleged violations of law at property located at off of Locke Drive in Leominster. The UAO was issued, by the admission of the Petitioner, on December 28, 2007, and required that an appeal be filed with OADR within twenty-one (21) days of the date of issuance. On the face of the evidence presented by the Petitioner in her own request for a hearing, the request appeared to be late. Therefore, Presiding Officer Pamela D. Harvey issued an Order to Show Cause to Petitioner to demonstrate through the filing of a "statement and evidence" why her appeal should not be dismissed for lack of jurisdiction due to untimely filing. Presiding Officer Harvey stated in the



Order to Show Cause that “[I]f you cannot show that the appeal is timely, the appeal must be dismissed.”

Under the administrative law applicable to this adjudicatory proceeding, the burden is upon a petitioner to file his or her appeal on time under the laws applicable to this adjudicatory proceeding. See, the Department’s Adjudicatory Proceeding regulations at 310 CMR 1.01(3)(a). The Department’s regulations are grounded in M.G.L. c. 30A, §§ 10 – 11A, which empower agencies to provide adjudicatory hearings and to promulgate regulations to implement this authority. Section 10 of M.G.L. c. 30A allows agencies to place the responsibility for requesting a hearing upon petitioners. The UAO clearly informed Petitioner of her obligation to file a request for a hearing within ten (10) days of the date of the UAO for specified terms of the order and within twenty-one (21) days for other specified terms. The UAO gave detailed instructions on how to file the request for the hearing. Petitioner did not file an appeal until well after these time periods had expired. In the April 16, 2008 Order to Show Cause, Presiding Officer Harvey clearly informed Petitioner that she risked dismissal of her case if she did not produce “evidence” to support her argument that a late filing should be accepted. Presiding Officers have clear authority to issue such Orders to Show Cause. See, 310 CMR 1.01(6)(d). A Presiding Officer also has the authority to issue a Recommended Final Decision for the dismissal of an appeal if there is a lack of jurisdiction due to untimeliness. See, 310 CMR 1.01(5)(a)(15)(f)(v).

The Petitioner concedes that the Department issued its UAO on December 28, 2007, however, Petitioner argues that her late filing was justified because she did not learn of the UAO until a February 26, 2008 pre-screening conference on her appeal of a related penalty assessment notice (“PAN”). Petitioner claims in her statement filed by counsel, that she received two copies of the PAN from the Department and never received a copy of the UAO. Petitioner has not filed

any affidavit or other evidence to support her claim that she did not receive the UAO in a timely manner.

The Departmental decisions have recognized in rare circumstances that the appeal period may be tolled based upon a limited number of grounds. However, the decisions that have allowed tolling have only done so where legally required notice was not given to a party entitled to receive it and where the failure to obtain notice caused that party to fail to file an appeal in a timely manner. Tolling has been found justifiable where actual notice was not given as required. See, e.g., *Matter of DeMaio*, Docket No. 97-063, Final Decision -- Order of Dismissal, 5 DEPR 59 (April 9, 1998) (abutter entitled to tolling where he never was sent a Notice of Intent and thus presumed not to know of pending proceedings until receiving actual knowledge of the project); *Matter of Cross Point Limited Partnership*, Docket No. 95-088, Final Decision -- Dismissal, 3 DEPR 82, 86 (April 30, 1996) (Abutters who did not receive notices of intent were entitled to tolling of appeal period until ten days after they learned of the issuance of the order of conditions); see also, *Matter of Bianco*, Docket No. 93-063, Decision on Department's Motion to Dismiss, 2 DEPR 227 (November 7, 1995) (mailing was never sent to petitioner); *Matter of Town of Hull*, Docket No. 90-168, Decision and Order on Motion to Dismiss (May 7, 1993) (evidence showed that order denying request for wetlands superseding order of conditions, dated June 29, 1990, was not actually placed in a mailbox until July 6, 1990 at the earliest, and appeal period was therefore computed from that later date).

In response to Petitioner's filing, the Department has filed a response including a detailed and specific affidavit from the counsel for the Department who mailed the UAO and the PAN on December 28, 2007. See, Affidavit of Mary Jude Pigsley, Esq. I find that affidavit specific and credible. In the affidavit, Attorney Pigsley describes in some detail her exact actions in

compiling and mailing the UAO and the PAN. She also attaches a copy of the mailing receipt, which shows two different weights for each of the mailings, one weight and postage for the UAO mailing and a different weight and postage for the PAN mailing. See, Pigsley Affidavit, ¶ 15 and attachments. Attorney Pigsley also testified that she had no extra copies of the UAO left over after her compilation and mailing work, and therefore it was clear that she had mailed a copy of the UAO to the Petitioner. See, Pigsley Affidavit, ¶¶ 9-14.¹

The Petitioner failed to produce any evidence that she filed her appeal notice on time or that there would be grounds for equitable tolling of that time period due to a failure of notice. See, 310 CMR 1.01(6)(d); *Matter of United States Postal Service*, Docket No. 90-240, 1995 MA ENV LEXIS 89, Final Decision – Order of Dismissal (March 27, 1995); *Matter of Fordham*, Docket No. 93-042, Final Decision -- Order of Dismissal (March 31, 1994) (petitioner could not support claim of postal service delivery error). In this case, Petitioner has only alleged in pleadings that she did not receive the UAO mailing. Petitioner has not filed any evidence to support this claim. The Petitioner could have produced a copy of the two mailings that she received attached to an affidavit by her swearing to their authenticity. Petitioner could have submitted an affidavit relating the facts as alleged. She did not do any of these things. The Department, on the other hand, has filed very specific testimonial and documentary evidence that the UAO was mailed on the date it was issued. I conclude that the weight of evidence shows that the UAO was mailed to Petitioner on time, and she was obliged to file her appeal within twenty-one days of the date of issuance. See, *Matter of R&R Home Construction Corp.*, Docket No. 95-009, 2 DEPR 89, Final Decision-Order of Dismissal (April 14, 1995) (wetlands permit appeal

¹ Note that all Department actions, if proved to have been mailed to the Petitioner's last known address, are presumed by law to have been received by the third day after such mailing. See, 310 CMR 1.01(3)(b).

was dismissed as late where petitioner did not contest the date on which a superseding order was issued, there was no evidence that it was mailed on a later date, and the appeal was filed after deadline for appeal). Failure to file a request for an appeal within this the required period is a jurisdictional defect that requires dismissal by the Presiding Officer. See, *In the Matter of Bay Park Development Trust*, Docket No. 88-291, Final Decision – Order of Dismissal, 7 MELR 1255, 1256 (March 31, 1989); *Matter of Treasure Island Condominium Association*, Docket No. 93-009 (May 13, 1993). see also, *In the Matter of Millenium Powers*, Final Decision-Order of Dismissal 5 DEPR 75 (May 1, 1998). Therefore, I conclude that the Petitioner has not carried her burden in response to the Order to Show Cause to produce some credible evidence that tolling would be warranted in this case due to late notice of the UAO issuance.

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

Laurel A. Mackay
Presiding Officer